National Native Title Council

spirit of Change

Submission

Senate Standing Committee on Legal and Constitutional Affairs – Inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012

PURPOSE

This Submission is being provided in response to the Inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (the "Amendment Bill").

SUBMISSION

The Amendment Bill sets out amendments to the administration of the National Native Title Tribunal (NNTT). The Bill includes amendments to the Native Title Act 1993 (Cth) ('NTA') to facilitate the transfer of the NNTT's appropriation, staff and some of its administrative functions to the Federal Court of Australia ('Federal Court'). The National Native Title Council considers the amendments to be administrative and do not intentionally impede the NNTT from properly carrying out its administrative functions.

Under s 190(1) of the NTA, the NNTT 'must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way'. The proposed amendments to the NTA seem to be coherent with the legislated objective of the NNTT, particularly in furtherance of the NNTT's economic efficiency.

With the enactment of the Bill, the National Native Title Council understands that the NNTT would remain an independent statutory authority and retain its current native title statutory functions, notably its future act and registration functions. It is also understood that the Bill will reduce duplication between the NNTT and the Federal Court.

The National Native Title Council is generally supportive of the purposes of the Amendment Bill, however some concerns and comments in relation to specific provisions contained in the Amendment Bill are set out below.

Improving Value for Money

The Explanatory Memorandum to the Bill states that the Bill implements the recommendations in chapter 6 of the *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* ('the Skehill Review'), which was publicly released on 8 June 2012.

The Australian Government commissioned the Skehill Review to assess small and medium agencies in the Attorney-General's portfolio and recommend ways for 'improving their value for money.'[1] The Explanatory Memorandum to the Bill claims that amendments will allow the NNTT and Federal Court to 'work together in a more coordinated and efficient manner and to achieve better outcomes.'[2]

The Explanatory Memorandum to the Bill also states that implementation of the Bill will create savings of $4.75 million each year from 2012-13, saving $19 million over the first four years.[3] As a matter of policy, the Explanatory Memorandum states that the Government will reinvest these savings in the *Stronger Futures in the Northern Territory*[4] initiative. This is also stated in the 2012-13 Federal Budget.[5]

The National Native Title Council is concerned that any savings achieved through the Amendment Bill are to be redirected away from the native title system. Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) have consistently argued that there should be additional funds made available to ensure the best outcomes for Traditional Owners across the country. The National Native Title Council would therefore strongly recommend that any savings achieved through the administrative changes be reinvested back in to the native title system.

Transfer of administrative powers and responsibilities to the Registrar of the Federal Court

The transfer of the NNTT's appropriation, staff and some of its administrative functions to the Federal Court, as facilitated by the Bill, effectively transfers certain administrative powers and responsibilities from the Native Title Registrar to the Registrar of the Federal Court.

Both the Native Title Registrar and the Registrar of the Federal Court are appointed by the Governor General. Under s 95(3)(b) *NTA*, there are special qualifications required of a person to be appointed as Native Title Registrar. However, there are no equivalent special qualifications required for a person to be appointed as Registrar of the Federal Court under the *FCAA*. A person can only be appointed as Native Title Registrar if 'the person has substantial experience in relation to:

(i) Aboriginal or Torres Strait Islander societies; or
(ii) the law; or
(iii) administration; or
(iv) any other activities relevant to the duties of the Registrar.'[6]

In reviewing the proposed amendments in relation to the NNTT under the Bill, the National Native Title Council and NTRBs/NTSPs would be concerned about the implications of the transferral of particular powers and responsibilities to the Registrar of the Federal Court who may not necessarily have substantial experience in relation to Aboriginal and Torres Strait Islander Societies, or the law or administration.

---

[1] Stephen Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, vii.
[2] Explanatory Memorandum, Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (Cth), [4].
[3] Explanatory Memorandum, Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (Cth), [15].
[4] See *Stronger Futures in the Northern Territory Act 2012* (Cth).
[5] Commonwealth of Australia, *Budget Paper No 2: Budget Measures 2012-13*, 87.
[6] *Native Title Act 1993* (Cth), s 95(3)(b).

Administrative responsibilities of the NNTT President
The Amendment Bill amends s 128 *NTA* to provide that the NNTT President is responsible for managing the administrative affairs of the NNTT except for matters that arise under the *FMAA* and *PSA*. Responsibility for matters that arise under the *FMAA* and the *PSA* have been transferred to the Registrar of the Federal Court, who is now the Chief Executive of the prescribed Agency and Head of the Statutory Agency for the purposes of the *FMAA* and *PSA* respectively.

The *FMAA* administers a framework for the management of public money and public property. The *PSA* administers the employment and management of public service employees.

The Amendment Bill also amends s 129 *NTA* to provide that the Registrar of the Federal Court, instead of the Native Title Registrar, assists the NNTT President in the management of the President's remaining administrative responsibilities. The powers conferred to the Registrar of the Federal Court are equivalent to the powers previously prescribed to the Native Title Registrar for such purpose. Also, the President retains the power to give directions in relation to those powers currently being exercised by the Native Title Registrar.

NTRBs/NTSPs are concerned that matters under the *FMAA* and *PSA* for matters relating to native title could be managed by a person without the requisite qualities of the Native Title Registrar under s 95(3)(b) *NTA*.

Registrar of the Federal Court's power to delegate responsibility
The Amendment Bill amends s 129A *NTA* to provide that the Registrar of the Federal Court may delegate all or any of the powers that he or she has in order to assist the NNTT President in managing the administration of NNTT. The Registrar of the Federal Court may delegate such powers to the Native Title Registrar, a Deputy Registrar, or a member of the staff assisting NNTT.

Further, as the NNTT is no longer a prescribed Agency for the purposes of the *FMAA*, it no longer receives a direct appropriation. Instead, it will be funded and resourced through the Federal Court prescribed Agency. The National Native Title Council therefore understands that funding will be reduced in accordance with the reduction of the administrative responsibilities of NNTT. However, after the amendment to s 129A *NTA*, there will be the possibility for administrative powers to be handed back to the NNTT despite the fact that NNTT is not funded to carry out those duties.

The National Native Title Council would be concerned if any administrative powers were delegated to the NNTT from the Registrar of the Federal Court without the appropriate resources.

To ensure the undisrupted delivery of NNTT's substantive functions the Amendment Bill could include a provision that ensures the Registrar of the Federal Court may not rely on the amended s 129A *NTA* to delegate all or any of the powers that he or she has to assist the NNTT President with managing the administration of NNTT *unless* the NNTT has the capacity to exercise those powers without hindering the execution of their substantive functions.

Appointment of staff to the NNTT
The NNTT President is no longer responsible for matters under the *FMAA* and *PSA*, which includes entering into contracts and staffing. These responsibilities belong to the Registrar of the Federal Court as the Chief Executive of the prescribed Agency and the Head of the Statutory Agency. As the NNTT is no longer an independent Statutory Agency for the purposes of the *PSA*, the Bill amends the *NTA* to reflect the fact that NNTT will no longer employ its own staff.

The amendment of s 130(1) *NTA* still provides that such Deputy Registrars and staff as necessary for the NNTT will still be provided. However, the amendment classifies the staff as 'staff assisting the tribunal' instead of 'staff of the tribunal.' This reflects the fact that the NNTT will not employ its own staff and will be assisted by staff of the Federal Court Statutory Agency. The Amendment Bill makes further necessary amendments in accordance with this fact.

The Amendment Bill amends s 130(2) *NTA* to provide that Deputy Registrars be appointed by the Registrar of the Federal Court instead of the Native Title Registrar. The Amendment Bill also amends s 130(3) *NTA* to provide that Deputy Registrars and staff assisting the NNTT are public servants made available for the purpose by the Registrar of the Federal Court.

The National Native Title Council is concerned that decisions in relation to the engagement of staff to assist NNTT would be made by a person without the requisite qualities of the Native Title Registrar as set out under s 95(3)(b) *NTA*.

Consultants

The Amendment Bill amends s 131A(1) *NTA* to provide that the NNTT President no longer has powers to directly engage consultants. Instead, the new provision provides that the President must arrange with the Registrar of the Federal Court for consultants to be engaged. The Amendment Bill amends s 131A(2) *NTA* to provide that, for the Registrar of the Federal Court to engage a consultant, the NNTT President must be of the opinion that the person has:

(a) Particular skills or knowledge in relation to matters of substantial relevance to the assistance, mediation or review; and
(b) So far as reasonable practicable, special knowledge in relation to Aboriginal and Torres Strait Islander societies.

The amendment to s 131A(2) *NTA* ensures that the engagement of consultants to the NNTT requires the same qualitative assessment as was required under the *NTA* prior to the enactment of the Bill.

Reporting and financial matters

As the NNTT is no longer a separate prescribed Agency for the purposes of the *FMAA*, the NNTT is not required to report directly to the Commonwealth Minister. The Amendment Bill amends the reporting provisions to accommodate the fact that the NNTT is no longer a prescribed Agency for the purposes of that Act.

The Amendment Bill amends s 133 *NTA* to provide that the NNTT must produce an annual report on the NNTT's activities and give the report to the Chief Justice, instead of the Commonwealth Minister. The amendment to s 133(3) *NTA* clarifies that the annual report on the NNTT's activities will be included in the annual report on the management of the administrative affairs of the Federal Court, which is prepared by the Chief Justice and given to the Attorney-General.

These amendments to s 133 *NTA* will also remove the requirement that the NNTT President's annual report includes the statements and audit report as required under the *FMAA*. As the NNTT is no longer a prescribed Agency under the *FMAA*, it no longer has any obligations under the *FMAA*. As the NNTT forms part of the prescribed Agency of the Federal Court for the purposes of the *FMAA*, the financial statements and audit report of the Federal Court also cover the Tribunal.

The National Native Title Council considers that this amendment may have unintended consequences with the NNTT no longer being directly accountable to the responsible minister, being the Attorney General, in particular in relation to the NNTT's activities and financial and employment matters.

Funding for the NNTT

The Skehill Review advised that NNTT should be listed as a separate 'sub-program' in the appropriation to the Federal Court to ensure that NNTT funding would not be improperly redirected to the Federal Court.[7] The NNTT's Annual Report 2011-12 included a 2012-13 Outlook, which stated that the NNTT appropriation directed to the Federal Court identified a NNTT sub-program.[8]

The National Native Title Council considers that the funding for the NNTT should be identified as a sub-program to ensure that NNTT funding is used for the statutory functions and activities of the NNTT.

[7] Stephen Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, 81-2.
[8] FOOTNOTE, 16-7.